

1 **MILSTEIN, ADELMAN & KREGER, LLP**

2 Wayne S. Kreger, State Bar No. 154759

3 Sara D. Avila, State Bar No. 263213

2800 Donald Douglas Loop North

3 Santa Monica, California 90405

4 Telephone: (310) 396-9600

Fax: (310) 396-9635

5 **WHATLEY DRAKE AND KALLAS, LLC**

6 Joe Whatley, Jr. (*Pro Hac Vice*) NY Bar No. 4406088)

7 1540 BROADWAY, 37TH FLOOR

NEW YORK, NY 10036

Telephone: (212) 447-7070

8 **LAW OFFICES OF HOWARD WEIL RUBINSTEIN**

9 Howard W. Rubinstein (*Pro Hac Vice*) FL Bar No. 104108)

Post Office Box 4839

Aspen, Colorado 81611

Telephone: (832) 715-2788

11 Attorneys for Plaintiff Michelle Weeks

12  
13 **UNITED STATES DISTRICT COURT**  
14 **FOR THE CENTRAL DISTRICT OF CALIFORNIA**

15  
16 SABENA LAKSHMI KAMMULA  
17 and MICHELLE WEEKS,  
individually and on behalf of all others  
similarly situated,

18 Plaintiff,

19 vs.

20 KELLOGG COMPANY, a Delaware  
corporation; KELLOGG USA, INC., a  
21 Michigan corporation; KELLOGG  
SALES COMPANY, a Delaware  
corporation, and DOES 1 through 100,  
22 inclusive,

23 Defendants.

24 No. CV09-08102 (MMM) (RZx)

25 Hon. Margaret M. Morrow

**PLAINTIFF'S MEMORANDUM OF  
POINTS AND AUTHORITIES IN  
SUPPORT OF MOTION FOR CLASS  
CERTIFICATION**

[Filed concurrently with Notice of Motion  
and Motion for Class Certification,  
Declaration of Wayne S. Kreger, Esq. and  
Declaration of Michelle Weeks; [Proposed]  
Order] lodged concurrently herewith]

Date: October 18, 2010

Time: 10:00 A.M.

Crtrm: 780

Judge: Hon. Margaret M. Morrow

26  
27  
28 **REDACTED**

1 Plaintiff Michelle Weeks (“Plaintiff”) submits the following supplemental  
2 memorandum of points and authorities in support of her Motion for Class  
3 Certification to: (a) certify a class of Californians who purchased Cocoa Krispies  
4 between June 1, 2009 and February 28, 2010 (the “Cocoa Krispies Class”); (b) certify  
5 a class of Californians who purchased Rice Krispies between June 1, 2009 and  
6 February 28, 2010 (the “Rice Krispies Class”); (c) appoint Plaintiff Michelle Weeks  
7 as the Class Representative; and (d) appoint Milstein Adelman & Kreger, LLC and  
8 Whatley Drake and Kallas, LLC as Class Counsel.

9

10 **I. INTRODUCTION**

11 This is a putative class action about two breakfast cereals, Kellogg’s® Cocoa  
12 Krispies® and Rice Krispies® (“Products” or “Immunity Cereal”). Through a  
13 massive, national advertising campaign, the Products were hawked to thousands of  
14 consumers by Defendants Kellogg Co., Kellogg USA, Inc. and Kellogg Sales Co.  
15 (collectively “Defendants” or “Kellogg”) as *new and improved* cereal that “now helps  
16 support your child’s immunity” and is “helping to support your family’s immunity.”  
17 Kellogg underscored these promises through an illustration of the Snap, Crackle and  
18 Pop™ cartoon characters dressed as superheroes, protecting consumers from illness.

19 Unfortunately for the consuming public, though, these claims were patently  
20 false. Appearing on every box of Cocoa Krispies and Rice Krispies, the Immunity  
21 Claims were nothing more than a scam aimed at taking advantage of the most  
22 vulnerable consumers with false promises of health. In fact, Kellogg unveiled these  
23 new claims in June 2009, taking advantage of the media hype surrounding the H1N1  
24 swine flu outbreak. Despite their shameless claims that the Products will keep a family  
25 healthy and support consumers’ immune systems, Kellogg was unable to produce a  
26 single document substantiating these claims. Kellogg never tested or studied Rice  
27 Krispies or Cocoa Krispies to determine whether their own claims are in fact true. For

1 example, Defendants did not determine whether eating either cereal with milk affects  
2 the purported health benefits. Nor do Defendants address whether the inclusion of  
3 unhealthy ingredients in the Immunity Cereal (e.g., sugar, high fructose corn syrup  
4 and partially hydrogenated oil) negates the purported ability of the Products to boost  
5 immunity.

6 The common evidence here will show that Kellogg's deceptive and fraudulent  
7 advertising tactics caused thousands of California consumers to purchase Rice  
8 Krispies and Cocoa Krispies and, in accord with scientific fact, have experienced *none*  
9 of the promised health and immunity benefits. The aforementioned claims were  
10 nothing more than a shameless ploy to monetize consumers' fears and take advantage  
11 of the media hype surrounding the H1N1 outbreak. Ultimately, the common evidence,  
12 applicable to each and every class member, will demonstrate that eating Rice Krispies  
13 and Cocoa Krispies will not support a person's immune system. As such, this case  
14 demands a collective remedy for several reasons.

15 *First*, common factual issues predominate. Kellogg made the identical false  
16 promise and written misrepresentations to every single class member. Indeed, they  
17 appear on each and every box of the Immunity Cereals in a large, bold font that is  
18 nearly the size of the name of the cereal. As such, this case can be resolved by  
19 considering four simple factual issues on a class-wide basis:

20 **Issue 1:** Did Kellogg claim, on the label of each box, that the Rice Krispies  
21 and Cocoa Krispies would "SUPPORT YOUR CHILD'S  
22 IMMUNITY" and help "support your family's IMMUNITY" along  
23 with other statements about the health benefits of these cereals?

24 **Issue 2:** At the time Kellogg made the Immunity Claims and related  
25 representations on its labels (and in its other advertising), did Kellogg  
26 have the requisite competent and reliable scientific evidence to  
27 substantiate those claims?

1           **Issue 3:** Does Kellogg's conduct constitute unfair competition and/or deceptive  
 2           advertising under applicable law?

3           **Issue 4:** Should Kellogg provide restitution to California consumers?

4           Second, once those factual issues are resolved, the application of the relevant  
 5           law poses no obstacle to certification. The Court need look no further than its recent  
 6           decision in *Weiner, et al. v. Dannon Company, Inc.*, 255 F.R.D. 658 (C.D.Cal. January  
 7           30, 2009), which found the Rule 23(b)(3) predominance of common questions  
 8           requirement was satisfied in a putative class action alleging violations of the CLRA  
 9           and the UCL. *Dannon*, 255 F.R.D. at 668-671. There, the defendant's "alleged  
 10          misrepresentations regarding the clinically proven health benefits of the Products are  
 11          prominently displayed on all of the Products' packaging" and thus "the alleged  
 12          misrepresentations were made to all class members." *Id.*, 255 F.R.D. at 669; *see also*  
 13          *Williams v. Gerber Prods. Co.*, 552 F.3d 934 (9th Cir. 2008) (reversing dismissal of  
 14          action, finding that the reasonable consumer should not "be expected to look beyond  
 15          misleading representations on the front of the box to discover the truth from the  
 16          ingredient list in small print on the side of the box."). Here, Kellogg made the  
 17          Immunity Claims on every package, thus making the misrepresentations to every  
 18          Class member.

19           Third, and more fundamentally, Kellogg sold thousands of boxes of the  
 20          Immunity Cereals to California consumers based on patently false representations as  
 21          to the cereals' health and immune system benefits. Indeed, these representations were  
 22          material, as "the characteristic that distinguishes the Products from others on the  
 23          market is their respective alleged health benefit." *Dannon*, 255 F.R.D. at 669. Here,  
 24          there can be no question that the promise of supporting a consumer's immune system  
 25          distinguished the Immunity Cereals from competing, less pricey, chocolatey and  
 26          krispy rice cereals.

1                  *Fourth*, Defendants' use of the word "NOW" and the phrase "has been  
 2 improved" on every package signaled to consumers a purported change to the former  
 3 versions of Cocoa Krispies and Rice Krispies. Kellogg intended for the word "NOW"  
 4 to [REDACTED]  
 5 [REDACTED]. Kreger Decl., ¶ 21, **Ex. 5** (June 2, 2010 Rule 30(b)(6) deposition of Kellogg  
 6 Co. representative Anne Marie Suarez-Davis ("Suarez-Davis Depo.") at 53:10-12).  
 7 "Any variation among proposed class members in their interaction with [the product]  
 8 and their choices as consumers is likely *de minimus*: consumers fear air borne germs,  
 9 see a product claiming to protect them, and purchase the product."). *Harvey v. CVS*  
 10 *Pharmacy, Inc.*, Case No. 3:08-cv-05058-JHN-RZ (C.D.Cal. April 27, 2010) (granting  
 11 certification where the product AirShield itself out to consumers as providing a  
 12 defense and cure for the common and other airborne illnesses). Here there can be no  
 13 question that the promise of supporting a consumer's immune system distinguished  
 14 the Immunity Cereals from competing, less expensive cereals.

15                  Finally, a June 3, 2010 News Release by the Federal Trade Commission  
 16 ("FTC") supports Plaintiffs' claims and is further evidence that class certification is  
 17 inevitable. There, the FTC Chairman referred to the Products' immunity claims as  
 18 "troubling" and "problematic," reprimanding Kellogg: "We expect more from a great  
 19 American company than making dubious claims – not once, but twice – that its cereals  
 20 improve children's health."<sup>1</sup> Equally revealing, when called to the carpet by the  
 21 Oregon Attorney General on their bold Immunity Claims, Kellogg chose to  
 22 discontinue making those Immunity Claims rather than provide reliable and competent  
 23 scientific evidence.<sup>2</sup> These agreements between Kellogg and other governmental  
 24  
 25

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26                  <sup>1</sup> Ex. 13 (FTC's June 3, 2010 Concurring Statement of Commissioner Julie Brill and Chairman Jon Leibowitz in the case  
 27 *In the Matter of Kellogg Co.*, FTC Docket No. C-4262). See also Ex. 11, 13 (FTC Order to Show Cause and Order  
 28 Modifying Order and FTC News Release regarding same).

<sup>2</sup> The Press Release by the Oregon Attorney General and [REDACTED]  
 [REDACTED] are attached to the Kreger Decl., ¶¶ 23-24, **Exhibits 7-8**.

1 agencies support Plaintiff's allegations and confirm the materiality of Kellogg's false  
 2 and misleading statements.

3 Thousands of consumers lost money and were defrauded. The Supreme Court  
 4 has long recognized that class actions "serve an important function in our system of  
 5 civil justice." *Gulf Oil v. Bernard*, 452 U.S. 89, 99 (1981). "Class actions are  
 6 designed to adjudicate the claims of many individuals at the same time, thereby  
 7 eliminating the possibility of repetitious litigation and providing small claimants with  
 8 a method of obtaining redress for claims that would otherwise be too small to warrant  
 9 individual litigation." *Wilens v. TD Waterhouse Gp., Inc.*, 120 Cal.App.4th 746, 752  
 10 (2003) (citing *Richmond v. Dar Indus., Inc.*, 29 Cal. 3d 462, 469 (1981)). In addition,  
 11 "allowing these individual claims to move forward separately would create a risk of  
 12 inconsistent judgments involving identical [misrepresentations by Kellogg] exactly  
 13 the problem which class actions are designed to prevent." *In re Syncor ERISA*  
 14 *Litigation*, 227 F.R.D. 338, 343 (C.D. Cal. 2005).

15 Despite these compelling and disturbing facts, in making its class  
 16 determination, the Court should not conduct a preliminary inquiry into the merits of  
 17 Plaintiffs' action. As the United States Supreme Court held in *Eisen v. Carlisle &*  
*Jacqueline*, 417 U.S. 156, 178 (1974), there is "nothing in either the language or  
 18 history of Rule 23 that gives a court any authority to conduct a preliminary inquiry  
 19 into the merits of a suit in order to determine whether it may be maintained as a class  
 20 action." *See also Mazza v. American Honda Motor Co.*, 254 F.R.D. 610, 616 (C.D.  
 21 Cal. 2008) (certifying a class and holding "Plaintiff needs not, however, show that it is  
 22 likely to prevail on the merits of their claims at the stage of class certification.").

23 Accordingly, Plaintiff Michelle Weeks, on behalf of herself and the proposed  
 24 class, respectfully requests that the Court issue an order granting this motion for class  
 25 certification and (i) certify a California Rice Krispies Class under Rule 23(b)(3); (ii)  
 26 certify a California Cocoa Krispies Class under Rule 23(b)(3); and (iii) appoint  
 27

1 Milstein, Adelman & Kreger, LLP and Whatley, Drake & Kallas, LLC, as class  
2 counsel pursuant to Fed. R. Civ. P. 23(g).

3

4 **II. STATEMENT OF FACTS**

5 **A. PROCEDURAL HISTORY**

6 On November 4, 2009, original class representative Sabena Kammula,  
7 individually and on behalf of all other similarly-situated California consumers,  
8 notified Defendants their immunities claims were in violation of the California Civil  
9 Code §§1750, et seq. (“CLRA”). Kreger Decl., ¶ 3. Plaintiff Kammula filed her  
10 original Complaint with this Court on November 5, 2009. Dkt. 1. The original  
11 Complaint only alleged a Cocoa Krispies Class. Personal service of the Complaint  
12 was deemed effective on November 20, 2009. Dkt. 10, 23, 24. Plaintiff filed a First  
13 Amended Complaint (“FAC”). The FAC added the Rice Krispies Sub-Class. FAC ¶  
14 36. Plaintiff agreed to extend the time for Defendants to respond to the operative  
15 Complaint. Dkt. 10. Defendants therefore filed an Answer to the First Amended  
16 Complaint (“Def. Answer”) on January 22, 2010. Dkt. 21.

17 Pursuant to Local Rule 23-3, Plaintiff’s motion for class certification was due  
18 within 90 days of service of the Complaint, on February 20, 2010. Plaintiffs therefore  
19 filed a motion for class certification on February 18, 2010. Dkt. 27. The Court  
20 graciously permitted Plaintiff to supplement the motion for class certification. Dkt. 35.  
21 The Court granted parties’ joint request to modify the class certification briefing  
22 schedule extending the deadline for Plaintiff to file the Supplemental Motion for Class  
23 Certification to August 9, 2010. Dkt. 60. Plaintiff filed the Second Amended  
24 Complaint (“Complaint” or “SAC”) on May 6, 2010 and dismissed Plaintiff Sabena  
25 Kammula on May 21, 2010. Dkts. 44 and 47.

26 //

27 //

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1           **B. FACTUAL BACKGROUND**

2           **1. Kellogg and Their Immunity Cereals**

3           Kellogg<sup>3</sup> is the world's leading cereal maker, offering a variety of adult and kid  
 4 cereals. Kellogg manufactures and markets Cocoa Krispies and Rice Krispies. SAC ¶  
 5 3; Answer at 3:10-11. Cocoa Krispies is a "chocolatey, sweetened rice cereal" and  
 6 Rice Krispies is a "toasted rice cereal." SAC ¶ 3; Answer at 3:10-11. Rice Krispies  
 7 and Cocoa Krispies shall be collectively referred to herein as the "Immunity Cereals"  
 8 or the "Products."<sup>4</sup> Kellogg's marketing of the Immunity Cereals was targeted toward  
 9 [REDACTED] Kreger Decl., ¶ 21, Ex. 5 (Suarez-Davis  
 10 Depo. at 53:13-16).

11           **2. Kellogg's Marketing Scheme**

12           Defendants introduced the Immunity Cereals into the marketplace to profit from  
 13 a growing trend in the manufacturing, advertising and sales of so-called "functional  
 14 foods." Kreger Decl., ¶ 9. Through a variety of advertising, including but not limited  
 15 to word-of-mouth, direct mailing, television, print, internet, and the packaging and  
 16 labeling of the Immunity Cereals, Defendants engaged in a massive and  
 17 [REDACTED]

18 [REDACTED]. Kreger  
 19 Decl., ¶ 21, Ex. 5 (Suarez-Davis Depo. at 53:10-12). Indeed, Defendants made the  
 20 following representations regarding the benefits of Immunity Cereals directly on the  
 21 packaging:

22           a. FRONT LABEL OF COCOA KRISPIES AND RICE KRISPIES:

- 23           • "NOW HELPS SUPPORT YOUR CHILD'S IMMUNITY"
- 24           • "25% DAILY VALUE OF ANTIOXIDANTS & NUTRIENTS"

25  
 26           <sup>3</sup> Kellogg USA Inc. and Kellogg Sales Co. both operate as wholly-owned subsidiaries of Kellogg Co. SAC ¶ 14; Answer  
 27 at 8:13-14. All three defendants will be collectively referred to as "Kellogg" or "Defendants."  
 28           <sup>4</sup> Although Kellogg also marketed the other Krispies Brand cereals (e.g. Frosted Krispies and Jumbo Krispies), at this  
 time Plaintiff seeks class certification only on behalf of those who purchased Rice Krispies and Cocoa Krispies during  
 the Class Period. Kreger Decl., ¶ 10.

1                   b. BACK LABEL OF COCOA KRISPIES AND RICE KRISPIES:

- 2                   • “Helping to support your family’s IMMUNITY”  
 3                   • “[H]as been improved to include antioxidants and nutrients that your  
 4                   family needs to help them stay healthy.”  
 5                   • “Enjoy this wholesome breakfast and help keep your family healthy.”

6 SAC ¶¶ 4, 23; Answer at 4:14-17, 13:14-17. *See* Kreger Decl., ¶¶ 17-20, **Exhibits 1-4**. Also on the backs of the labels, Defendants used cartoon characters dressed as  
 7 superheroes to underscore the power of the Rice Krispies and Cocoa Krispies to  
 8 support and protect a person’s health. Kreger Decl., ¶¶ 17-20, **Exhibits 1-4**. The  
 9 Immunity Claims were made on every label throughout the United States. Kreger  
 10 Decl., ¶ 21, **Ex. 5** (Suarez-Davis Depo. at 99:5-19).

12 The above claims are false, deceptive and misleading. SAC ¶ 24. Defendants  
 13 do not have competent and reliable scientific evidence to support their claims about  
 14 the Immunity Cereals. For example, Defendants [REDACTED]

15 [REDACTED]  
 16 [REDACTED]. Kreger Decl., ¶ 22, **Ex. 6** (June 2, 2010 Rule 30(b)(6) deposition of Kellogg  
 17 Co. representative Laura Zervic (“Zervic Depo.”) at 42:13-23, 44:19-25). Contrary to  
 18 their consistent and uniform claims, Defendants make numerous material omissions.  
 19 For example, nowhere on Defendants’ labels or advertising do Defendants disclose  
 20 whether consumption of milk with the Immunity Cereals dilutes the antioxidants and  
 21 vitamins purportedly added to the cereals. Kreger Decl., ¶ 22, **Ex. 6** (Zervic Depo. at  
 22 35:5-22, [REDACTED]  
 23 [REDACTED]).

24 Defendants’ uniform false representations to thousands of California  
 25 consumers, including Ms. Weeks, led Class members to collectively spend millions of  
 26 their hard-earned dollars in reliance upon claims such as “NOW HELPS SUPPORT  
 27 YOUR CHILD’S IMMUNITY[,]” among other claims. Defendants’ Immunity

1 Claims lead parents and those seeking good health to believe the Immunity Cereals  
 2 would have the tangible effect of supporting their body's immune system. *See* SAC ¶  
 3 28. Indeed, Plaintiff believed, as plainly stated on the Cocoa Krispies and Rice  
 4 Krispies labels, that the cereal would support her and her child's immunity and would  
 5 keep them healthy. Weeks Decl., ¶ 5. Ms. Weeks would not have purchased the  
 6 Immunity Cereals, but for Defendants' representations that consuming the Immunity  
 7 Cereals would boost her and her child's immune system and keep them healthy.  
 8 Weeks Decl., ¶ 5.

9           **3. Plaintiff Michelle Weeks**

10 Plaintiff Michelle Weeks is an individual residing in Ventura County,  
 11 California. SAC ¶ 13. Plaintiff is the mother of a young child. SAC ¶ 13. During the  
 12 summer of 2009, Plaintiff became particularly concerned with improving the immune  
 13 system of her child and herself. Declaration of Michelle Weeks ("Weeks Decl.") ¶ 3.  
 14 During that time, Plaintiff purchased Cocoa Krispies and Rice Immunity Cereals,  
 15 relying on Kellogg's misrepresentations on the cereals' labels. Weeks Decl., ¶¶ 4, 5.

16           **4. Defendants' Agreements with Governmental Entities**

17           **Regarding the Immunity Claims**

18 On December 17, 2009, the Oregon Attorney General announced an agreement  
 19 with Kellogg to "stop shipping cereal boxes with the immunity language by January  
 20 15, destroy more than 2 million units of packaging with the immunity claim, and  
 21 cease making such health claim unless it provides the Oregon Department of Justice  
 22 with advance notice and competent reliable scientific evidence." Defendants also  
 23 agreed to donate cereal to the Oregon Food Bank and Feeding America. Kreger Decl.,  
 24 ¶¶ 23-24, **Exhibits 7-8** (News Release and letter agreement).  
 25 [REDACTED]

26           Kreger Decl., ¶ 25, **Ex. 9** (June 2, 2010 Rule  
 27  
 28

1 30(b)(6) deposition of Kellogg representative Tom Monroe (“Monroe Depo.”) at  
 2 51:22-52:5).

3 This June, for the second time in one year, Kellogg “agreed to new advertising  
 4 restrictions to resolve a [FTC] Commission investigation into questionable immunity-  
 5 related claims for Rice Krispies cereal.” Kreger Decl., ¶¶ 26-28, **Exhibits 10-12**.  
 6 Under a previous order by the FTC, Kellogg was barred from making certain claims  
 7 about benefits of cognitive health, process or function provided by Kellogg’s food  
 8 products unless the claims were true. *Id.* The FTC expanded its order, prohibiting  
 9 Kellogg from making claims about any health benefit of any food unless the claims  
 10 are backed by scientific evidence and not misleading. *Id.*<sup>5</sup>

11 Neither of these agreements provided for restitution to California consumers.  
 12 The agreements demonstrate common factual issues predominate, and that a remedy  
 13 for California consumers can be fashioned on a classwide basis.

14 **C. Meet and Confer**

15 Before bringing this motion and consistent with Local Rule 7-3, on February  
 16 12, 2010, counsel for Plaintiff met and conferred with counsel for Kellogg regarding  
 17 the substance of this motion. Kreger Decl., at ¶ 11. On or about April 26, 2010,  
 18 Defendants agreed to stipulate that the numerosity requirement of Rule 23(a)(1) is  
 19 satisfied under the facts of this case. Kreger Decl., at ¶ 11.

21 **III. PROPOSED CLASS DEFINITIONS**

22 Plaintiff seeks to certify two California classes pursuant to Rule 23(a) and  
 23 23(b)(3), as follows: (i) The proposed “Cocoa Krispies Class” consists of: “All  
 24 persons residing in the State of California who purchased Cocoa Krispies for personal  
 25 use and not for resale during the time period June 1, 2009 through February 28, 2010,  
 26 inclusive”; (ii) the proposed “Rice Krispies Class” consists of: “All persons residing

27 <sup>5</sup> Plaintiff was unaware of this FTC investigation related to the Immunity Claims until the FTC issued its June 3, 2010  
 28 News Release.

1 in the State of California who purchased Rice Krispies for personal use and not for  
 2 resale during the time period June 1, 2009 through February 28, 2010, inclusive.”  
 3 Excluded from both classes are any employees of Kellogg, and any individuals  
 4 receiving remuneration from Kellogg. The Cocoa Krispies Class and the Rice Krispies  
 5 Class shall be collectively referred to herein as the “Class.”  
 6

7 **IV. ARGUMENT**

8 The dual purposes of Rule 23 are: “(1) to promote judicial economy through  
 9 the efficient resolution of multiple claims in a single action; and (2) to provide persons  
 10 with smaller claims, who would otherwise be economically precluded from doing so,  
 11 the opportunity to assert their rights.” *O'Connor v. Boeing North American, Inc.*, 184  
 12 F.R.D. 311, 318 (C.D.Ca. 1998) (granting class certification) (citing Wright, Miller &  
 13 Kane § 1754 at 49; Schwarzer, Tashima & Wagstaffe, *Cal.Prac. Guide: Fed.Civ.Pro.Before Trial* § 10:250 (The Rutter Group 1998)); *see also Eisen v. Carlise & Jacqueline*, 417 U.S. 156, 175 (1974); *Sollenbarger v. Mountain States Tel. & Tel. Co.*, 121 F.R.D. 417, 436 (D.N.M. 1988). “[F]raud perpetrated on numerous  
 17 persons by the use of similar misrepresentations” is particularly suited for a class  
 18 action. *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 624 (1997) (“Predominance  
 19 is a test readily met in certain cases alleging consumer or securities fraud or violations  
 20 of antitrust laws”) *Blackie v. Barrack*, 524 F.2d 891, 903 (9th Cir. 1975) (quoting  
 21 Advisory Committee on Rule 23, Proposed Amendments to the Rules of Civil  
 22 Procedure, 39 F.R.D. 69, 103 (1966)), *cert denied*, 429 U.S. 816 (1976).

23 Given the purposes of the class action device, district courts have “broad  
 24 discretion” to determine whether the Rule 23 requirements are met. *Zinser*, 253 F.3d  
 25 at 1186; *In re Mego.Fin.Corp.Sec.Litig.*, 213 F.3d 454, 461 (9th Cir. 2000);  
 26 *Yamamoto v. Omiya*, 564 F.2d 1319, 1325 (9th Cir. 1977). Further, the Rule 23(a)  
 27 requirements are permissive. *See e.g. Reynoso v. South County Concepts*, 2007 WL  
 28

1 4592119, \*3 (C.D.Cal. Oct. 15, 2007); *Medrano v. WCG Holdings, Inc.*, 2007 WL  
 2 4592113, \*3 (C.D.Cal. Oct. 15, 2007). Thus, a trial court is only required to form a  
 3 reasonable judgment. *Blackie v. Barrack*, 524 F.2d 891, 901 n. 17 (9th Cir. 1975). In  
 4 this regard, “[t]he court is bound to take the substantive allegations of the complaint as  
 5 true.” *Id.* This proposed class action squarely meets the criteria of Rule 23(a) of the  
 6 Federal Rules of Civil Procedure and is maintainable under Rule 23(b)(3).

7           **A. THIS ACTION SATISFIES ALL FOUR REQUIREMENTS OF**  
 8           **RULE 23(a)**

9           Commonly referred to as the numerosity, commonality, typicality and adequacy  
 10 requirements, *see Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir. 1998),  
 11 under Fed. R. Civ. P. 23(a), a district court may certify a class if: “(1) the class is so  
 12 numerous that joinder of all members is impracticable, (2) there are questions of law  
 13 or fact common to the class, (3) the claims or defenses of the representative parties are  
 14 typical of the claims or defenses of the class, and (4) the representative parties will  
 15 fairly and adequately protect the interests of the class.” Fed.R.Civ.P. 23(a). Plaintiff  
 16 bears the burden of demonstrating “each of the four requirements of Rule 23(a) *and* at  
 17 least one of the requirements of Rule 23(b)” are met. *Zinser v. Accufix Research Inst.*,  
 18 253 F.3d 1180, 1186 (9th Cir. 2001) (citing *Hanon v. Dataproducts Corp.*, 976 F.2d  
 19 497, 508 (9th Cir. 1992) (italics added)).

20           **1. Defendants Agree the Class is Sufficiently Numerous**

21           “The prerequisite of numerosity is discharged if ‘the class is so large that  
 22 joinder of all members is impracticable.’” *Hanlon v. Chrysler Corp.*, 150 F.3d 1011,  
 23 1019 (9th Cir. 1998) (quoting Fed.R.Civ.P. 23(a)(1)). The exact size of the class need  
 24 not be known as long as general knowledge and common sense indicate that the class  
 25 is sufficiently numerous. *Jordan v. County of Los Angeles*, 669 F.2d 1311, 1319 (9th  
 26 Cir. 1982), *vacated* on other grounds, 459 U.S. 810 (1982). Nonetheless, on or about  
 27  
 28

1 April 26, 2010, Defendants agreed to stipulate that the numerosity requirement of  
 2 Rule 23(a)(1) is satisfied under the facts of this case. Kreger Decl., at ¶ 11.

3 **2. Commonality Is Established Because This Case Is Comprised Of**  
 4 **Uniform Misrepresentations And Omissions Giving Rise To**  
 5 **Common Questions Subject To Common Proof**

6 Under Rule 23(a)(2), there must be questions of law or fact common to the  
 7 proposed class. Courts have described the showing needed to meet the commonality  
 8 requirement as “minimal” and “not high.” *Hanlon v. Chrysler Corp.*, 150 F.3d 1011,  
 9 1020 (9th Cir. 1998).

10 In assessing commonality, “[t]he existence of shared legal issues with divergent  
 11 factual predicates is sufficient, as is a common core of salient facts coupled with  
 12 disparate legal remedies within the class.” *Hanlon*, 150 F.3d at 1019. Additionally,  
 13 “[t]he commonality test is qualitative rather than quantitative – one significant issue  
 14 common to the class may be sufficient to warrant certification.” *Dukes v. Wal-Mart,*  
 15 *Inc.*, 474 F.3d 1214, 1225 (9th Cir. 2007).

16 This case is based on uniform misrepresentations made prominently on every  
 17 box of Immunity Cereals sold to every class member. Accordingly, it is indisputable  
 18 that the claims of all class members “stem from the same source.” See *Hanlon*, 150  
 19 F.3d at 1019-20. The same misrepresentations appeared on the label of every Rice  
 20 Krispies and Cocoa Krispies label during the Class Period.<sup>6</sup> As such, the case can be  
 21 boiled down to a few common issues that can easily be resolved according to class-  
 22 wide proof:

23 **Issue 1:** Did Kellogg claim, on each package sold during the Class Period, that  
 24 Rice Krispies and Cocoa Krispies would “SUPPORT YOUR  
 25 CHILD’S IMMUNITY” and “support your family’s IMMUNITY”  
 26 along with other statements about the health benefits of these cereals?

27 <sup>6</sup> The Class Period is June 1, 2009 through February 28, 2010. See Kreger Decl., ¶ 21, Ex. 5 (Suarez-Davis Depo. at  
 28 67:2-13) (██).

1           **Issue 2:** At the time Kellogg made the Immunity Cereals and related  
 2 representations on its labels (and in its other advertising), did Kellogg  
 3 have the requisite competent and reliable scientific evidence to  
 4 substantiate those claims?

5           **Issue 3:** Does Kellogg's conduct constitute unfair competition and/or deceptive  
 6 advertising under applicable law?

7           **Issue 4:** Should Kellogg provide restitution to California consumers?

8 Accordingly, there is a common core of salient facts and legal issues. *See Hanlon*, 150  
 9 F.3d at 1019; *see also Staton v. Boeing Co.*, 327 F.3d 938, 957 (9th Cir. 2003);  
 10 *Phillips v. Accredited Home Lenders Holding Co.*, 2007 U.S. Dist. LEXIS 59880  
 11 (C.D.Cal. May 16, 2007) (commonality satisfied where claims arose from “the same  
 12 solicitations”). Thus, the Rule 23(a)(2) commonality requirement is easily satisfied.

13           **3. Typicality Is Established Because Plaintiff’s Claims Are Based On**  
 14           **The Same Conduct And The Same Injury As The Class**

15 Third, “[t]he typicality prerequisite of Rule 23(a) is fulfilled if ‘the claims or  
 16 defenses of the representative parties are typical of the claims or defenses of the  
 17 class.’” *Hanlon*, 150 F.3d at 1020 (quoting Fed.R.Civ.P. 23(a)(3)). “The test of  
 18 typicality is whether other members have the same or similar injury, whether the  
 19 action is based on conduct which is not unique to the named plaintiffs, and whether  
 20 other class members have been injured by the same course of conduct.” *Hanon v.*  
*Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992); *accord Dukes*, 474 F.3d at  
 21 1232. Under Rule 23(a)’s “permissive standards, representative claims are ‘typical’ if  
 22 they are reasonably co-extensive with those of absent class members; they need not be  
 23 substantially identical.” *Hanlon*, 140 F.3d at 1020; *see also Gen. Tel. Co. of Southwest*  
*of Falcon*, 457 U.S. 147, 157 (1982).

24           Here, Plaintiff’s claims are identical to the claims of the proposed Class.  
 25 Plaintiff purchased the Immunity Cereals because she believed that the Products “help

support" her and her child's "immunity." *See Weeks Decl.*, ¶ 5. Plaintiff's claims pose the same questions of law and fact as the class members and arise from the same label claims that give rise to the claims of the other class members. Plaintiff suffered the same injury – the loss of purchase – and seeks restitution on behalf of all Class members. Accordingly, Plaintiff is well-suited to represent the Class.

#### **4. The Proposed Class Representative Will Fairly and Adequately Protect Class Interests**

"The final hurdle interposed by Rule 23(a) is that 'the representative parties will fairly and adequately protect the interests of the class.'" *Hanlon*, 150 F.3d at 1020 (quoting Fed.R.Civ.P. 23(a)(4)). "Resolution of two questions determines legal adequacy: (1) do the named plaintiffs and their counsel have any conflicts of interest with other class members and (2) will the named plaintiffs and their counsel prosecute the action vigorously on behalf of the class?" *Id.* *See also Lerwill v. Inflight Motion Pictures, Inc.*, 582 F.2d 507, 512 (9th Cir. 1978); *Hanlon*, 150 F.3d at 1021; *Crawford v. Honig*, 37 F.3d 485, 487 (9th Cir. 1994).

##### **a) Neither the Class Representative Nor Her Counsel Have Any Conflict Of Interest With The Proposed Class**

The class representative may not have interests antagonistic to the remainder of the class. *Lerwill v. Inflight Motion Pictures, Inc.*, 582 F.2d 507, 512 (9th Cir. 1978). Because adequacy is closely related to typicality, where, as here, the claims of the class members and the class representative are reasonably co-extensive, there is no conflict. *General Tel. Co. v. Falcon*, 457 U.S. 147, 157-58, fn. 13 (1982). Moreover, if there are any doubts as to the adequacy of representation or potential conflicts, they should be resolved in favor of upholding the class, subject to later possible reconsideration. *Newberg on Class Actions* §7.24 at 7-90 to 7-81 (3d ed. 1992). Here, both Ms. Weeks' claims and the Class' claims arise from the same uniform misrepresentations and standardized conduct of Kellogg. There are no real or

anticipated conflicts between Plaintiff and the proposed members of the Class. Further, Ms. Weeks seeks to recover the same remedy as all other members of the proposed Class.

**b) The Class Representative Will Prosecute This Action Vigorously**

The general rule is that an adequate class representative needs only to have personal experience with the claims of the lawsuit and a general familiarity with the facts, but not necessarily a clear recollection of all facts relevant to their claims. See e.g., *Jimenez v. Domino's Pizza, Inc.*, 238 F.R.D. 241, 249 (C.D.Cal. 2006).

Here, Plaintiff has personal experience with the claims of the lawsuit and is quite familiar with the underlying facts. Weeks Decl., ¶¶ 11, 12. Plaintiff purchased Rice Krispies and Cocoa Krispies based on the promises and representations of supporting immunity. *Id.* at ¶¶ 3-5. Plaintiff has demonstrated her ability to monitor class counsel and assure vigorous prosecution of the case. Ms. Weeks has reviewed the complaint, provided information and has communicated with counsel throughout her involvement in this litigation. Weeks Decl., ¶ 12. Accordingly, the proposed class representative is more than adequate. *See, e.g. Moeller v. Taco Bell Corp.*, 220 F.R.D. 604, 611 (N.D. Cal. 2004) (“It is not necessary that a class representative be intimately familiar with every factual and legal issue in the case; rather it is enough that the representative understand the gravamen of the claim”).

**c) Counsel Are Qualified, Experienced And Have The Resources To Vigorously Prosecute This Action**

When the court certifies a class, the court must also appoint class counsel unless a specific statute provides otherwise. Fed. R. Civ. P. 23(g)(1)(A). The basic requirement for appointment as class counsel is that such counsel must fairly and adequately represent the interests of the class. *See* Fed. R. Civ. P. 23(g)(1)(B). In considering the requirement that “Plaintiffs are represented by qualified and

1 competent counsel[,]” *Dukes*, 474 F.3d at 1233, “the Court will look to the  
 2 professional qualifications, skills, experience and resources of the lawyers.” *Haley v.*  
 3 *Medtronic, Inc.*, 169 F.R.D. 643, 650 (C.D. Cal. 1996).

4 The proposed class representative has retained experienced, competent legal  
 5 counsel to represent her and the Class. *See* Kreger Decl., ¶¶ 12-16; *see also* Kreger  
 6 Decl., ¶ 30, **Ex. 13** (firm resume of Whatley, Drake & Kallas, LLC). To date  
 7 Whatley, Drake and Kallas, LLP (“WDK”), and Milstein, Adelman & Kreger “MAK”  
 8 have vigorously litigated this matter, including, but not limited to, propounding  
 9 discovery requests, reviewing documents and taking depositions. Based on their  
 10 performance to date and their commitment to this litigation, WDK and MAK will  
 11 continue to fairly and adequately represent the proposed Class.

12 **B. The Court Should Certify A Rule 23(b)(3) Class**

13 In addition to meeting the prerequisites of Rule 23(a), this action also satisfies  
 14 Rule 23(b)(3) for all of Plaintiff’s claims. Class certification pursuant to Rule 23(b)(3)  
 15 requires “the questions of law or fact common to the members of the class  
 16 predominate over any questions affecting only individual members of the class, and  
 17 that a class action is superior to other available methods for the fair and efficient  
 18 adjudication of the controversy.” Fed.R.Civ.P. Rule 23(b)(3). “Certification under  
 19 Rule 23(b)(3) is proper ‘whenever the actual interests of the parties can be served best  
 20 by settling their differences in a single action.’” *Negrete v. Allianz Life Ins. Co. of N.*  
*Am.*, 238 F.R.D. 482, 489 (C.D.Cal.2006) (quoting *Hanlon*, 150 F.3d. at 1022).

22 **1. Common Issues Predominate Over Individual Issues**

23 “The Rule 23(b)(3) predominance inquiry tests whether the proposed classes  
 24 are sufficiently cohesive to warrant adjudication by representation.” *Amchem Prods.,*  
*Inc. v. Windsor*, 521 U.S. 591, 623 (1997). “When common questions present a  
 25 significant aspect of the case and they can be resolved for all members of the class in a  
 26 single adjudication, there is a clear justification for handling the dispute on a  
 27

1 representative rather than individual basis.” *Hanlon*, 150 F.3d at 1022. The Court  
 2 rests its examination on the legal or factual questions of the individual class members.  
 3 *Id.* Central to this inquiry is “the notion that the adjudication of common issues will  
 4 help achieve judicial economy.” *Zinser*, 253 F.3d at 1189 (*quoting Valentino v.*  
 5 *Carter-Wallace, Inc.*, 97 F.3d 1227, 1234 (9th Cir. 1996)). “The policy at the very  
 6 core of the class action mechanism is to overcome the problem that small recoveries  
 7 do not provide the incentive for any individual to bring a solo action prosecuting his  
 8 or her rights.” *Amchem Prods., Inc.*, 521 U.S. at 617.

9 Here, common questions of fact and law predominate over any alleged  
 10 idiosyncratic differences between proposed class members. Common factual issues  
 11 predominate because all of Plaintiff’s UCL and CLRA claims are based on the  
 12 identical false promise and representation that Kellogg makes uniformly on every  
 13 single Krispies Cereal box it sold to the proposed class members – that the Product  
 14 will “support the body’s immune system” and help consumers “stay healthy” and the  
 15 like. *See e.g. Hanlon v. Chrysler Corp.*, 140 F.3d 1011, 1022 (9th Cir. 1998). Further,  
 16 Defendants’ misrepresentations regarding the Immunity Cereals’ abilities to help  
 17 support a child’s immunity “are prominently displayed on all of the products’  
 18 packaging” and thus “the alleged misrepresentations were made to all class members.”  
 19 *Weiner, et al., v. Dannon Company, Inc.*, 255 F.R.D. 658 (C.D.Cal. January 30, 2009)  
 20 (finding Rule 23(b)(3) predominance was satisfied).

21 As discussed above regarding “commonality,” the factual questions posed by  
 22 this case are simple: (1) were these misrepresentations on every package of the  
 23 Immunity Cereals during the Class Period; (2) does Kellogg have competent and  
 24 reliable scientific evidence to support the labels’ bold representations; and, (3) what  
 25 are the damages. These are all common issues that can easily be proven on a classwide  
 26 basis.

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 2800 Donald Douglas Loop North  
 Santa Monica, California 90405

1           Moreover, unlike most putative consumer fraud class actions that are based on  
 2 an array of oral and written representations, this case is much simpler because it deals  
 3 with a uniform, written misrepresentation made to every single class member. Not  
 4 only was this misrepresentation present on each and every package, it was  
 5 underscored by Kellogg's aggressive, [REDACTED] advertising and marketing  
 6 campaign. Kreger Decl., ¶ 21, Ex. 5 (Suarez-Davis Depo. 87:9-15). Nonetheless, the  
 7 primary issue for trial is simply whether the uniform representation is true or false.  
 8 There are few, if any, significant individualized factual issues posed here.

9           **a) Individual Reliance Is Irrelevant To The Inquiry On**  
 10           **Plaintiff's UCL And CLRA Claims**

11           The purpose of the UCL is to deter unfair business practices and “protect both  
 12 consumers and competitors by promoting fair competition in commercial markets for  
 13 goods and services.” McAdams v. Monier, Inc., 182 Cal.App.4th 174, 187 (Cal. App.  
 14 2010). It is well-settled that “claims brought under the California Unfair Competition  
 15 Law are commonly certified for class treatment.” In re Abbott Laboratories Norvir  
 16 Antitrust Litig., 2007 WL 168999, \*8 (N.D.Cal. June 11, 2007)(finding that alleged  
 17 conduct subject to common proof presented common questions of fact and law that  
 18 class action was superior method of adjudication of UCL claim).

19           Only the named plaintiff in a UCL class action need demonstrate injury,  
 20 causation and reliance. *In re Tobacco II Cases*, 46 Cal.4th 298 (2009). The California  
 21 Supreme Court has noted that the class representative must show the  
 22 misrepresentation was “an immediate cause of the injury-producing conduct, the  
 23 plaintiff need not demonstrate it was the only cause. It is not necessary that the  
 24 plaintiff’s reliance upon the truth of the fraudulent misrepresentations be the sole or  
 25 even the predominant or decisive factor influencing his conduct.” *Id.* Instead, “[i]t is  
 26 enough that the representation has played a substantial part, and so had been a  
 27 substantial factor, in influencing his decision. *Id.*

1       Moreover, a presumption, or at least an inference, of reliance arises wherever  
 2 there is a showing that a misrepresentation was material.” *Id.* A misrepresentation is  
 3 “material” where “a reasonable man would attach importance to its existence or  
 4 nonexistence in determining his choice of action in the transaction in question, and as  
 5 such materiality is generally a question of fact unless the jury could not reasonably  
 6 find that a reasonable man would have been influenced by it.” *Id.* at 326. *Plascencia*,  
 7 2009 WL 2560732 (N.D. Cal., August 21, 2009) (holding putative class members  
 8 need not establish reliance). “Common issues will thus predominate on UCL  
 9 claims...as *Tobacco II* sets out a liberal approach to the reliance inquiry.” *Id.*

10     Recently, the Honorable Jacqueline H. Nguyen granted certification where the  
 11 product AirShield itself out to consumers as providing a defense and cure for the  
 12 common and other airborne illnesses. *Harvey v. CVS Pharmacy, Inc.*, Case No. 3:08-  
 13 cv-05058-JHN-RZ (C.D.Cal. April 27, 2010) (“Any variation among proposed class  
 14 members in their interaction with [the product] and their choices as consumers is  
 15 likely *de minimis*: consumers fear air borne germs, see a product claiming to protect  
 16 them, and purchase the product.). Here there can be no question that the promise of  
 17 supporting a consumer’s immune system distinguished the Immunity Cereals from  
 18 competing, less expensive cereals. Indeed, Kellogg received numerous consumer  
 19 complaints regarding the Immunity Claims, thus supporting a finding that a  
 20 reasonable consumer would place importance on those claims.

21     Thus, the Immunity Claims were a substantial cause in Plaintiff’s decision to  
 22 purchase Cocoa Krispies and Rice Krispies. Indeed, Kellogg included the Immunity  
 23 Claims for the purpose of influencing reasonable consumers; otherwise, there would  
 24 be no reason to include the Immunity Claims on each package and launch [REDACTED]

25 [REDACTED] ! Moreover, the FTC’s June 13 Order is further evidence that “a  
 26 reasonable man” would attach importance to and be influenced by the Immunity  
 27

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 Santa Monica, California 90405

1 Claims. *See* Kreger Decl. ¶ 27, **Ex. 11** (calling the Immunity Claims “dubious”,  
 2 “questionable” and “problematic”).

3 Where such claims are “predicated on identical allegations,” and “common,  
 4 standardized sales materials,” courts in the Central District of California have held  
 5 that “[c]ommon issues regarding [defendants] fraudulent scheme predominate over  
 6 questions affecting only individual members of the subclass.” *Negrete*, 238 F.R.D. at  
 7 495-96 (certifying California UCL class action). Although a class representative must  
 8 allege an injury in fact and reliance, there is no requirement that all absent class  
 9 members must do the same. *See In re Tobacco Cases*, 46 Cal.4th 298.

10 The inference of reliance also applies to CLRA claims. *Mass. Mutual Life Ins.*  
 11 *Co. v. Superior Court*, 97 Cal.App.4th 1282 (Cal. App. 4th Dist. 2002). The CLRA’s  
 12 “causation” requirement requires a showing of reliance by the Class, but “plaintiffs  
 13 may satisfy their burden of ‘showing causation as to each [class member] by showing  
 14 materiality as to all.’” *McAdams*, 182 Cal.App.4th at 183 (reversing trial court’s order  
 15 denying plaintiff’s motion for class certification). An inference of reliance is made on an  
 16 objective “reasonable person” standard, and is appropriate when a defendant omits  
 17 facts that would have been material to any reasonable person contemplating the  
 18 purchase of the defendant’s product. *Id.* at 184.

19 There is an inference of reliance in the present case because Plaintiff alleges  
 20 Kellogg made a single, material misrepresentation to each class member. These  
 21 Immunity Claims are the very reason Ms. Weeks and others purchased the purportedly  
 22 *new and improved* cereals. Weeks Decl., ¶ 5. Further, as demonstrated by the FTC’s  
 23 investigation and June 3, 2010 statement regarding the Immunity Claims, the  
 24 “reasonable person” standard is surely satisfied. Plaintiff may thus prove with  
 25 generalized evidence that Kellogg’s conduct was “material” and “likely to deceive”  
 26 members of the public. *Plascencia*, 2009 WL 2560732 at \*10. Consumers were  
 27 actually deceived by Kellogg’s material performance claims on their Immunity  
 28

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 2800 Donald Douglas Loop North  
 Santa Monica, California 90405

1 Cereals boxes. It is clear Plaintiff suffered the same material deception as experienced  
 2 by the proposed Class and appropriately seeks an injunction on behalf of all Class  
 3 members. Thus, Plaintiff is typical and well-suited to represent the Class.

4 **b) Individual Reliance Is Irrelevant To The Inquiry On**  
 5 **Plaintiff's Fraud Claims**

6 Any alleged differences in reliance of potential class members on the uniform  
 7 misrepresentations do not outweigh the common course of Kellogg's conduct. *See e.g.*  
 8 *In re First Alliance Mortgage Co.*, 471 F.3d 977, 989-991 (9th Cir. 2006). In *First*  
 9 *Reliance*, the Ninth Circuit upheld the district court's certification of a class of  
 10 borrowers alleging consumer fraud, noting that “[c]lass treatment has been permitted  
 11 in fraud cases where, as in this case, a standardized sales pitch is employed.”  
 12 Rejecting the defendants' argument that individualized reliance issues predominated,  
 13 the Ninth Circuit found that it “is the underlying scheme which demands attention.  
 14 Each plaintiff is similarly situated with respect to it, and it would be folly to force  
 15 each bond purchaser to prove the nucleus of the alleged fraud again and again.” *Id.* at  
 16 990-91. According to *First Reliance*, the relevant test is whether the consumer fraud  
 17 claims stem from a “common course of conduct.” *Id.* at 990 (quoting *Blackie*, 524  
 18 F.2d at 902).

19 Reliance may be inferred on a class-wide basis where the alleged consumer  
 20 fraud arises from uniform and standardized misrepresentations. *Vasquez v. Superior*  
 21 *Court*, 4 Cal.3d 800 (1971). Indeed, if a plaintiff “can establish without individual  
 22 testimony that the representations were made to each plaintiff and that they were  
 23 false, it should not be unduly complicated to sustain the burden of proving reliance  
 24 thereon as a common element.” *Id.*, 4 Cal.3d at 814. Further, “[t]he fact of reliance  
 25 upon alleged false representations may be inferred from the circumstances attending  
 26 the transaction which often times afford much stronger and more satisfactory evidence  
 27 of the inducement which prompted the party defrauded to enter into the contract than

1 his direct testimony to the same effect.” *Id.* Therefore, based on the “common course  
 2 of conduct” at issue in this case, namely, the packaging, advertising and marketing of  
 3 the Immunity Claims, class certification is appropriate. *See Blackie*, 524 F.2d at 903-  
 4 04.

5 **2. A Class Action Is The Superior Method Of Adjudication**

6 Finally, a class action must be “superior to other available methods for the fair  
 7 and efficient adjudication of a controversy.” Fed.R.Civ.P. 23(b)(3). “A class action is  
 8 the superior method for managing litigation if no realistic alternative exists.” *Reynoso*  
 9 v. *South County Concepts*, 2007 WL 452119, \*4 (C.D.Cal. Oct. 14, 2007) (quotations  
 10 omitted). In addition, a class action is superior where, as here, “class-wide litigation of  
 11 common issues will reduce litigation costs and promote greater efficiency.” *Valentino*,  
 12 97 F.3d at 1234. Regarding the question of superiority, Rule 23(b)(3) enumerates four  
 13 nonexclusive factors. Each of the factors supports class certification here.

14 The first factor to be considered is “the interest of members of the class in  
 15 individually controlling the prosecution...of separate actions”. Fed. R. Civ. P.  
 16 23(b)(3)(A). The interest of each class member is minimal. The primary policy of the  
 17 class action mechanism is to enable the collective vindication of the rights of  
 18 numerous persons whose small claims may not be worth pursuing in individual  
 19 actions. *See Amchem Prods., Inc.*, 521 U.S. at 617. Indeed, they would clog the  
 20 “courts with innumerable individual suits litigating the same issues repeatedly.”  
 21 *Dukes*, 474 F.3d 1244. Here, while the aggregate damages of the class members may  
 22 be large, each class member paid a few dollars for their purchase of Immunity Cereals.  
 23 Weeks Decl., ¶ 4. *See Hanlon*, 150 F.3d at 1023. Moreover, given that this action  
 24 involves a threat to public health and an attempt to eliminate that threat through  
 25 consumption of the Immunity Cereals, the interests of the Class as a whole certainly  
 26 outweigh any interest in individual damages.

1           The second factor, “the extent and nature of any litigation concerning the  
 2 controversy already commenced by...members of the class” also supports proceeding  
 3 with certification in this action. Fed.R.Civ.P.23(b)(3)(B). To date, no other civil  
 4 actions regarding the Immunity Claims have been filed on behalf of California  
 5 consumers.<sup>7</sup> Because the Class consists solely of California purchasers of the  
 6 Immunity Cereals, the third factor, “the desirability...of concentrating the litigation of  
 7 the claims in a particular forum” is also satisfied.

8           Finally, courts consider “the difficulties likely to be encountered in the  
 9 management of the litigation.” Fed.R.Civ.P. 23(b)(3)(D). There are no manageability  
 10 issues in the instant action. Prosecution of the claims of the putative members of each  
 11 Class in a single class action will not create more management problems than the  
 12 alternative (i.e. the prosecution of thousands of separate lawsuits by each member of  
 13 the Class). Given the number and importance of the common questions of law and  
 14 fact described above, resolving these issues in one class action is manageable and  
 15 would further the twin goals of judicial efficiency and procedural fairness.

16

## 17           V. CONCLUSION

18           For the reasons stated herein, Plaintiff, on behalf of herself and the proposed  
 19 class, respectfully requests that the Court issue an order granting this motion for  
 20 class certification and: (1) certifying a Rule 23(b)(3) Cocoa Krispies Class; (2)  
 21 certifying a Rule 23(b)(3) Rice Krispies Class and (3) appointing Milstein, Adelman  
 22 & Kreger, LLP and Whatley, Drake & Kallas, LLC as class counsel pursuant to  
 23 Fed.R. Civ.P. 23(g).

24           //

25           //

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26

27           <sup>7</sup> Additionally, the FTC’s investigation of Defendants’ Immunity Claims, and their subsequent agreement does not  
 28 present any bar to certification here. The agreement between Kellogg and Defendants did not require Kellogg to provide  
 restitution to California consumers. Further, the Chairman’s Separate Statement supports Plaintiff’s claims.

1  
2 DATED: August 10, 2010

Respectfully submitted,

3 Attorneys for Plaintiff Michelle Weeks

4 /s/ Wayne S. Kreger

5 MILSTEIN, ADELMAN & KREGER LLP

6 Wayne S. Kreger

7 Sara D. Avila

2800 Donald Douglas Loop North

Santa Monica, CA 90405

8 WHATLEY DRAKE AND KALLAS, LLC

9 Joe R. Whatley, Jr. (*Pro Hac Vice*)

10 1540 Broadway, 37th Floor

11 New York , NY 10036

12 Howard Weil Rubinstein (*Pro Hac Vice*)

13 P.O. Box 4839

14 Aspen , CO 81611

Milstein, Adelman & Kreger, LLP  
2800 Donald Douglas Loop North  
Santa Monica, California 90405